

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

ADNAN NIAZ MIR,)
Complainant,)
)
v.) 8 U.S.C. §1324b Proceeding
) Case No. 92B00225
FEDERAL BUREAU OF)
PRISONS,)
Respondent.)
_____)

FINAL DECISION AND ORDER
(November 15, 1993)

MARVIN H. MORSE, Administrative Law Judge

Appearances: Adnan Niaz Mir, pro se.
Kelly Tirik, Esq., for Respondent.

I. Statutory and Regulatory Background

This case arises under Section 102 of the Immigration Reform and Control Act of 1986 (IRCA), as amended, 8 U.S.C. §1324b. Section 1324b provides that it is an unfair immigration-related employment practice to:

- . discriminate against any individual other than an unauthorized alien with respect to discharge from employment because of that individual's national origin;

- . discriminate against a "protected individual" with respect to discharge from employment because of that individual's citizenship status. 8 U.S.C. §1324b(a)(1). A "protected individual" is a citizen or national of the United States, an alien lawfully admitted for either permanent or temporary residence, or an individual admitted as a refugee or granted asylum, 8 U.S.C. §1324b(a)(3);

- "intimidate, threaten, coerce, or retaliate against any individual" in order to interfere with any right or privilege secured under §1324b or "because the individual intends to file or has filed a charge or a complaint," or assisted, or participated in any manner in a §1324b investigation, proceeding, or hearing. 8 U.S.C. §1324b(a)(5).

The cause of action codified as amended at §1324b was enacted out of concern that enforcement of the employer sanctions program, 8 U.S.C. §1324a, might lead to employment discrimination against those who appear "foreign," including those who, although not citizens of the United States, are lawfully present in this country. "Joint Explanatory Statement of the Committee of Conference," H.R. CONF. REP. NO. 99-1000, 99th Cong., 2d Sess. 87 (1986). Protected individuals alleging discriminatory treatment on the basis of national origin or citizenship must file their charges with the Office of Special Counsel for Immigration-Related Unfair Employment Practices (Special Counsel or OSC). The OSC is authorized to file complaints before administrative law judges designated by the Attorney General. 8 U.S.C. §1324b(e)(2).

IRCA authorizes private actions in the event that OSC does not file a complaint before an administrative law judge within a 120-day period. The person making the charge may file a complaint directly before an administrative law judge within 90 days of receipt of notice from OSC that it will not file a complaint. 8 U.S.C. §1324b(d)(2).

II. Procedural Summary

On April 3, 1992, Adnan Niaz Mir (Mir) filed a charge with OSC, alleging that the Federal Bureau of Prisons (FBP) had wrongfully refused to hire him as a correctional officer in violation of §1324b. On September 15, 1992, OSC issued its determination letter advising that it had not completed its investigation of his charge. OSC informed Mir that as the statutory 120-day period for OSC investigation and exclusive complaint-filing had expired, he could file his own complaint within 90 days of his receipt of the letter in the Office of the Chief Administrative Hearing Officer (OCAHO).

Two days later, on September 17, 1992, OSC wrote again to Mir, advising of its determination that "there is insufficient evidence of reasonable cause to believe Mir was discriminated against by FBP." OSC explained also that,

the Department of Justice has recently reevaluated whether federal agencies are covered under 28 U.S.C. §1324b. The Department of Justice has determined that the Office of Special Counsel lacks jurisdiction to pursue such claims against federal agencies, including the Bureau of Prisons. Therefore, this Office has decided not to file a complaint with an administrative law judge regarding this matter.

On October 9, 1992, Mir filed this private action. Mir contends that although qualified for the position of correctional officer, he was denied employment by FBP at the Federal Correctional Institution (FCI), Sheridan, Oregon. He alleges that the denial of employment constituted prohibited national origin and citizenship status discrimination. On October 15, 1992, OCAHO issued its notice of hearing, transmitting the complaint to FBP.

On November 19, 1992, FBP timely filed its answer to the complaint together with a motion to dismiss premised on a determination that federal agencies are protected against §1324b liability by virtue of the sovereign immunity doctrine. Upon receipt of the motion, I invited FBP to address its sovereign immunity claim in context of Roginsky v. Dept. of Defense, 3 OCAHO 426 (5/5/92). On December 11, 1992, Mir filed a letter-pleading dated December 5, in response to FBP's motion. FBP's brief dated December 30, 1992, in support of its motion, referred to OSC's September 17, 1992 determination letter, and analyzed Roginsky in context of a memorandum of the Office of Legal Counsel (OLC), Department of Justice. On January 15, 1993, I asked, inter alia, that FBP file a copy of the OLC memorandum, which it did on January 22, 1993. On January 28, Mir filed a January 24 letter-pleading to the effect that his December 5, 1993 pleading was his "complete response to the Respondents (sic) sovereign immunity claim."

By order dated April 20, 1993, 3 OCAHO 510, I addressed the sovereign immunity claim in light of the OLC memorandum, and adhered to the conclusion in Roginsky, that rejects applicability of that defense to claims under §1324b. The April 20 order dismissed Mir's national origin claim on jurisdictional grounds on the basis that FBP has more than 14 employees. However, while noting that Mir may be entitled to assert a citizenship discrimination claim "as a procedural matter, the circumstances demonstrated by the pleadings to date do not clearly disclose a basis" for such a claim. Mir, 3 OCAHO 510 at 12. Mir was directed "to submit a statement which describes the basis for a claim of citizenship status discrimination as distinct from the national origin claim." Id.

Following grants of several extensions of time in which to respond to the April 20 order, on July 22, 1993, Mir filed a four page letter- pleading dated July 9, 1993. In response, on August 12, 1993, FBP filed a motion for summary decision, accompanied by a memorandum of law and five exhibits. Mir filed no reply to the motion.

III. *Discussion*

Complainant's statement in his July filing is well taken: "As a nation of immigrants we have always taken pride in the fairness with which we have treated persons of other cultural backgrounds." Nevertheless, while aspersions about characteristics of appearance or speech of a United States citizen may implicate attitudes about national origin, they are uninformative as to citizenship status discrimination. See Yefremov v. NYC Dep't of Transportation, 3 OCAHO 562 (9/21/93) at 44; Kamal-Griffin v. Curtis, Mallett-Prevost, Colt & Mosle, 3 OCAHO 550 (8/16/93) at 25. FBP's memorandum of law aptly summarizes my April 20, 1993 order, and Mir's July 1993 filing. Assuming the facts as alleged by Mir, the conduct of FBP personnel at FCI Sheridan did not constitute citizenship status discrimination.

Nothing in Mir's pleadings or arguments, understood in a light most favorable to him, suggests citizenship status, as distinct from national origin, discrimination. The case has not yet been made for a successful claim of citizenship status discrimination on the part of a United States citizen, absent proof of over documentation in purported compliance with §1324a, e.g., U.S. v. Marcel Watch Corp., 1 OCAHO 143 (3/22/900), Jones v. DeWitt Nursing Home, 1 OCAHO 189 (6/29/90), or absent proof of discriminatory preference for non-citizens. While discrimination may be supposed where there is evidence of favoritism for non-citizens, no such suggestion is made in this case.

I am unable to conclude that there is any genuine dispute of material fact that supports Mir's claim of citizenship, discrimination by FBP. Accordingly, FBP is entitled to its motion. 28 C.F.R. §68.38(c). See Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Anderson v. Liberty Lobby, 477 U.S. 242 (1986). Accordingly, the motion is granted.

IV. *Ultimate Findings, Conclusions, and Order*

- A. I have considered the pleadings and arguments submitted by the parties. All motions and requests not previously disposed of are

denied. It follows that, in addition to the findings and conclusion already stated, I find and conclude that:

1. The national origin discrimination claim is dismissed on the basis that the administrative law judge lacks jurisdiction over such a claim against Respondent because it employs more than 14 individuals. 8 U.S.C. §1324b(a)(2)(B); Mir. v. Federal Bureau of Prisons, 3 OCAHO 510.
2. There is no genuine dispute of material fact as to warrant a confrontational evidentiary hearing on the claim of citizenship status discrimination. 28 C.F.R. §68.38(c).
3. Complainant has failed to prove by a preponderance of the evidence that Respondent discriminated against him based on his citizenship status.
4. Upon the basis of the whole record, consisting of the pleadings of the parties, a state of facts has not been demonstrated by Complainant sufficient to satisfy the preponderance of the evidence standard of 8 U.S.C. §1324b(g)(2)(A). Respondent has not engaged and is not engaging with respect to Complainant in the unfair immigration- related employment practice alleged and within the jurisdiction of this Office, i.e., citizenship-based discrimination.

B. The complaint is dismissed. 8 U.S.C. §1324b(g)(3).

C. Pursuant to 8 U.S.C. §1324b(g)(1), this Final Decision and Order is the final administrative order in this proceeding and "shall be final unless appealed" within 60 days to a United States court of appeals in accordance with 8 U.S.C. §1324b(i).

SO ORDERED.

Dated and entered this 15th day of November, 1993.

MARVIN H. MORSE
Administrative Law Judge